

August 8, 1991

MEMORANDUM

TO: The Honorable Mario R. Ramil
Director of Labor and Industrial Relations

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Disclosure of Hawaii State Employment Service Applicant
Data to the Hawaii Civil Rights Commission

Mr. Orlando Watanabe's memorandum dated June 26, 1991 to the Honorable Warren Price, III, Attorney General, requesting an opinion regarding the above-referenced matter has been forwarded to the Office of Information Practices ("OIP") for a reply in accordance with established protocol.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Department of Labor and Industrial Relations' Hawaii State Employment Service Division ("HSES") may disclose information obtained from job applicants registered with the HSES, as well as information concerning employers who have listed job openings with the HSES, to the Hawaii Civil Rights Commission ("Commission") for the purpose of a Commission investigation of an employment discrimination complaint filed with the Commission under chapter 368, Hawaii Revised Statutes.

BRIEF ANSWER

The HSES government records provided for our review contain such information as a job applicant's home address, home telephone number, social security number, date of birth, previous work history, citizenship, ethnic identifier, welfare status,

handicap status, and comments regarding the result of the applicant's referral to an employer. Based upon previous OIP opinion letters, and an examination of the provisions of part II of the UIPA, in our opinion, the public disclosure of much of the information contained in these government records would constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.

However, based upon an examination of the Commission's statutory duties and functions, and other statutes authorizing the disclosure to the Commission of confidential records maintained by the Department of Labor and Industrial Relations, in our opinion the HSES is authorized to disclose the subject government records to the Commission under section 92F-19(a), Hawaii Revised Statutes. Under section 92F-19(a)(3), Hawaii Revised Statutes, an agency may disclose government records that are protected from disclosure under the UIPA's personal privacy exception, when disclosure "[r]easonably appears proper for the performance of the requesting agency's duties and functions."

Because we conclude that the HSES may disclose the records provided for our review to the Commission under section 92F-19(a)(3), Hawaii Revised Statutes, it is not necessary for the OIP to opine concerning whether the HSES must obtain the written consent of a job applicant before disclosing the applicant's records, or concerning the adequacy of the written consent form attached to its memorandum to the Attorney General requesting an opinion.

FACTS

The Department of Labor and Industrial Relations' Hawaii State Employment Service ("HSES") provides a free job referral and placement service that matches individuals seeking employment with employers who have registered with the HSES and who placed a "work order." In addition, as a condition of receiving unemployment compensation benefits under the State's Employment Security Law, chapter 383, Hawaii Revised Statutes, unemployment compensation claimants must register for work with the HSES. The HSES program is administered in cooperation with the U.S. Department of Labor's Employment and Training Administration, and its funding is supplied primarily through grants from the federal government.

Under chapter 368, Hawaii Revised Statutes, the Hawaii Civil Rights Commission is directed to receive, investigate, and conciliate complaints alleging any unlawful discriminatory practice under chapters 489 and 515 and part I of chapter 378,

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Hawaii Revised Statutes, and conduct proceedings on complaints alleging unlawful employment practices where conciliatory efforts are inappropriate or unsuccessful.

By memorandum dated June 26, 1991 to the Honorable Warren Price III, Attorney General, the HSES requested advice concerning whether it may disclose HSES applicant data and information provided by employers registered with the HSES to the Commission for the purpose of its investigation of a complaint alleging unlawful employment discrimination. In its memorandum to the Attorney General, the HSES states that the Commission is willing to certify that the information is sought for the purpose of a Commission investigation, and that it would be kept confidential.

Additionally, if disclosure of job applicant and employer data is not permissible under the UIPA, the HSES requests advice concerning whether it may disclose applicant data to the Commission if the job applicant signs a written consent authorizing the HSES to disclose the information to the Commission.

DISCUSSION

I. INTRODUCTION

As an initial matter, according to the U.S. Department of Labor's Solicitor's Division of Employment Training and Legal Services, the Federal Privacy Act of 1974, 5 U.S.C. . 552a (1990) does not apply to records maintained by state employment service programs administered with federal funds, nor do federal statutes or regulations restrict the disclosure of job applicant records maintained by states participating in the employment service program. Accordingly, the resolution of the issue presented is entirely a matter of state law.

In resolving the issue presented, we must first determine whether the government records, or information therein, that is sought by the Commission is public under the freedom of information provisions of part II of the UIPA. If not, we must then determine whether the inter-agency disclosure provisions of section 92F-19, Hawaii Revised Statutes, nevertheless permit the HSES to disclose the information to the Commission.

II. IS THE INFORMATION SOUGHT BY THE COMMISSION PUBLIC?

Under the State's new public records law, the UIPA, all government records must be made available for public inspection

and copying, unless one of the exceptions set forth at section 92F-13, Hawaii Revised Statutes, protects the records or information from public disclosure. See Haw. Rev. Stat. . 92F-11(b) (Supp. 1990). We have previously advised agencies that they should not disclose government records protected from disclosure by section 92F-13(1), Hawaii Revised Statutes, which does not require agencies to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." See, e.g. OIP Op. Ltr. Nos. 90-30 (Oct. 23, 1990); 91-8 (June 24, 1991).

Based upon our review of the attachments to the HSES's memorandum to the Attorney General dated June 26, 1991, in our opinion, the disclosure of much (but not necessarily all) of the information contained in the HSES' applicant records would constitute a clearly unwarranted invasion of privacy under the UIPA.

By way of example, HSES records entitled "Referral and Placement Record" and "E/S Applicant Characteristics" contain a listing of the names, social security numbers, home addresses, home telephone numbers, dates of birth, handicap status, welfare status, comments concerning the result of the applicant's referral to an employer who has placed a job order with the HSES, and information concerning each applicant's prior employment history. We have previously opined that the disclosure of an individual's social security number, date of birth, home address and home telephone number, citizenship, and physical characteristics, as contained in a government record, would constitute a clearly unwarranted invasion of personal privacy under the UIPA. See, e.g., OIP Op. Ltr. Nos. 89-16 (Dec. 27, 1989), 90-10 (Feb. 26, 1990), and 90-14 (March 30, 1990) (home address and telephone number); 90-7 (Feb. 9, 1990) (social security number and date of birth); 90-25 (July 12, 1990) (citizenship and physical characteristics); and 90-25 (July 12, 1990) and 91-1 (Feb. 15, 1991) (physical characteristics).

Additionally, under the UIPA individuals have a significant privacy interest in information concerning their "medical . . . history, diagnosis, condition, treatment, or evaluation,"¹ and in their "nongovernmental employment history,"² as well as

¹See Haw. Rev. Stat. . 92F-14(b) (1) (Supp. 1990).

²See Haw. Rev. Stat. . 92F-14(b) (5) (Supp. 1990).

"information relating to [their] eligibility for social service or welfare benefits."³ Because there is little public interest in the disclosure of this data,⁴ we believe that the disclosure of information concerning a job applicant's handicap status, welfare status, and employment history would also constitute a clearly unwarranted invasion of personal privacy under the UIPA. Further, we shall assume for purposes of our analysis, that the disclosure of an individual's ethnic status or identifier would also be prohibited by the UIPA's personal privacy exception.⁵

Because we conclude that much of the information contained in the government records provided for our review would be

³See Haw. Rev. Stat. . 92F-14(b)(3) (Supp. 1990); see also, OIP Op. Ltr. No. 90-26 (July 17, 1990).

⁴Under section 92F-14(a), Hawaii Revised Statutes, the disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure of the record outweighs the individual's privacy interest in the record. In previous opinions, we have stated that the "public interest" to be considered under this balancing test is the public interest in disclosure of information which sheds light on the conduct and actions of government agencies and their officers and employees. See OIP Opinion Letter No. 90-9 at p. 5-7 (Feb. 26, 1990) for a detailed discussion of this UIPA balancing test. We believe that only in an unusual case would the disclosure of information concerning an individual's employment history, welfare status, or medical condition, diagnosis, or treatment, shed significant light upon the conduct and actions of agencies or their officials.

⁵A future OIP opinion letter shall examine whether the disclosure of an individual's ethnic status or identifier would constitute a clearly unwarranted invasion of personal privacy under the UIPA. However, courts that have addressed this question under similar open records statutes have concluded that the disclosure of information concerning an individual's ethnicity would constitute a clearly unwarranted invasion of personal privacy. See, e.g., Hemenway v. Hughes, 601 F. Supp. 1002 (D.C. D.C. 1985); CBS, Inc. v. Partee, 556 N.E.2d 648 (Ill. App. 1990).

protected from public disclosure under the UIPA's personal privacy exception, we now turn to an examination of whether under the UIPA's inter-agency disclosure provisions, the HSES is nevertheless authorized to disclose HSES applicant data to the Commission for the purpose of investigating an employment discrimination complaint.

III. UIPA INTER-AGENCY DISCLOSURE PROVISIONS

One of the legislative purposes underlying the enactment of the UIPA was to "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating to them." Haw. Rev. Stat. . 92F-2 (Supp. 1990). To further this policy, the Legislature established limitations on the inter-agency disclosure of government records, or information therein, that are "confidential" under part II of the UIPA. These restrictions are set forth at section 92F-19, Hawaii Revised Statutes.

Section 92F-19(a), Hawaii Revised Statutes, provides in pertinent part:

.92F-19 Limitations on disclosure of government records to other agencies. (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

- (1) Compatible with the purpose for which the information was collected or obtained;
- (2) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (3) Reasonably appears proper for the performance of the requesting agency's duties and functions;
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- (10) Otherwise subject to disclosure under this chapter.

Haw. Rev. Stat. . 92F-19(a)(1), (2), (3) and (10) (Supp. 1990).

Because the HSES collects the job applicant and employer data for the purpose of matching job seekers with employers, and employers with job seekers, in our opinion, disclosure of applicant and employer data to the Commission for the purpose of investigating an unlawful discrimination complaint would be neither "[c]ompatible with the purpose for which the information was collected or obtained," nor "[c]onsistent with the reasonable expectations of use and disclosure under which the information was provided." Therefore, in our opinion, neither section 92F-19(a)(1) or (2), Hawaii Revised Statutes, would authorize disclosure of the pertinent records to the Commission. The only paragraph of subsection (a), section 92F-19, Hawaii Revised Statutes, that would authorize disclosure under these circumstances would be paragraph (3).

For the reasons set forth below, we believe that disclosure of job applicant and employer data to the Commission for the purpose of investigating an unlawful employment discrimination complaint would be reasonably proper for the performance of the Commission's statutory duties and functions and, therefore, the disclosure of this information is authorized by section 92F-19 (a)(3), Hawaii Revised Statutes.

First, as set forth above, the Commission is charged with the statutory duty of receiving, investigating, and conciliating complaints which allege unlawful employment discrimination. See Haw. Rev. Stat. . 368-3(1) (Supp. 1990). Information concerning how an employer which has placed a job order with the HSES has treated HSES referrals or job applicants may often be relevant to a determination whether unlawful employment discrimination has occurred.

Additionally, in creating the Commission, the Legislature clearly foresaw the Commission's need to gather evidence in the course of an investigation, as under section 368-3(2), Hawaii Revised Statutes, the Legislature empowered the Commission to "compel the attendance of witnesses and the production of documents by the issuance of subpoenas." Moreover, the Legislature established as a criminal offense, the act of intentionally resisting, preventing, or impeding with the Commission or its agents in the performance of its duties. See Haw. Rev. Stat. . 368-3(1) (Supp. 1990).

Additionally, some of the job applicant data maintained by the HSES relates to individuals who have filed for unemployment compensation benefits and who have registered with the HSES as required by section 383-29(2), Hawaii Revised Statutes, as a

condition of receiving unemployment compensation benefits. Section 383-95, Hawaii Revised Statutes, states that information obtained by the Department of Labor and Industrial Relations ("DLIR") from any individual in administering chapter 383, Hawaii Revised Statutes, "shall be held confidential and shall not be disclosed or open to public inspection in any manner revealing the individual's identity." Haw. Rev. Stat. . 383-95(a) (1985).

However, while the Legislature established the confidentiality of records associated with the DLIR's administration of chapter 383, Hawaii Revised Statutes, it also authorized the DLIR to disclose such information to "[a]ny federal, state or municipal agency charged with the administration of a fair employment practice or anti-discrimination law." Haw. Rev. Stat. . 383-95(a) (3) (1985). This provision indicates that the Legislature also foresaw the need for agencies charged with enforcement of employment practices laws to have access to records maintained by the DLIR. In our opinion, it also lends further support to our conclusion that disclosure of HSES job applicant and employer data to the Commission for the purpose of investigating a complaint alleging unlawful employment discrimination would be reasonably proper for the performance of the Commission's duties and functions.

Lastly, our conclusion is not affected by the fact that other federal agencies may also investigate complaints brought by job applicants referred by the HSES. Although federal regulations create a job service complaint system, see 20 C.F.R. .. 658.400 through 658-426 (1990), the Commission is not divested of its jurisdiction by a job applicant's filing of a complaint under this complaint system.

Because we have concluded that the HSES is authorized by section 92F-19(a), Hawaii Revised Statutes, to disclose job applicant and employer data to the Commission for the purpose of investigating an unlawful employment discrimination complaint, it is not necessary for us to opine concerning whether the HSES must obtain the applicant's written consent to disclose such information, or for us to pass upon the adequacy of the written consent form provided for our review.

CONCLUSION

Although we conclude that the disclosure of much of the information contained in HSES records concerning individuals who

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have registered with the HSES, or have been referred to employers registered with the HSES would constitute a clearly unwarranted invasion of personal privacy under part II of the UIPA, for the reasons set forth above, we believe that the disclosure of these government records to the Commission for the purpose of investigating an unlawful employment discrimination complaint would be reasonably proper for the Commission's performance of its express statutory duties. Accordingly, the inter-agency disclosure of these government records is authorized by section 92F-19(a)(3), Hawaii Revised Statutes.

Hugh R. Jones
Staff Attorney

HRJ:sc
c: Ms. Linda C. Tseu, Executive Director
Hawaii Civil Rights Commission

APPROVED:

Kathleen A. Callaghan
Director